No. 93-661

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In the Supreme Court of the United States

OCTOBER TERM, 1993

WHITE CONSOLIDATED INDUSTRIES, INC.,
Petitioner,

v.

PENSION BENEFIT GUARANTY CORPORATION,
Respondent.

WHITE CONSOLIDATED INDUSTRIES, INC.,
and JOHN DOE(S),
Petitioners,

v.

THE BLAW KNOX RETIREMENT INCOME PLAN, BLAW KNOX PENSION PLAN, BLAW KNOX IAM PENSION PLAN, BLAW KNOX EQUIPMENT PENSION PLAN, BLAW KNOX DURALOY PENSION PLAN FOR SALARIED EMPLOYEES, BLAW KNOX DURALOY HOURLY PENSION PLAN and FIDUCIARIES DEAN G. WILSON and RICHARD A. MCINTYRE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that, in light of the allegations in PBGC's amended complaint, WCI's transaction to evade pension liabilities did not become effective for purposes of 29 U.S.C. § 1369 until after WCI ceased making substantial contributions to the transferred pension plans.

2. Whether the court of appeals correctly held that the allegations in PBGC's amended complaint state a viable claim for relief against WCI pursuant to 29 U.S.C. § 1362 under the substance-over-form doctrine.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent Pension Benefit Guaranty Corporation ("PBGC") is the federal agency that guarantees the pensions of over 40 million American workers under Title IV of the Employee Retirement Income Security Act of

1974, as amended, 29 U.S.C. §§ 1301-1461 ("ERISA").[1] When an underfunded plan covered by Title IV terminates, PBGC becomes trustee of the plan and is responsible for paying certain basic benefits to the plan's participants. 29 U.S.C. §§ 1322, 1342, 1361. Under ERISA, PBGC has a claim against the plan sponsor and each member of its controlled group for the difference between the plan's assets and the value of its benefit liabilities. 29 U.S.C. § 1362(a)(1), (b)(1)(A).[2] ERISA further provides that a former sponsor of a pension plan is liable under Title IV of ERISA if it entered into a transaction with a principal purpose of evading pension liabilities and the transaction became effective within five years of the termination of the pension plan giving rise to the liability. *See* 29 U.S.C. § 1369(a).[3]

This case arises from Petitioner White Consolidated Industries, Inc.'s ("WCI") transfer of a group of unprofitable businesses and nine associated underfunded pension plans (the "Plans") to Blaw Knox Corporation ("BKC"), an undercapitalized corporate shell created specifically for this purpose. Petitioner's Appendix ("App.") 4. PBGC alleges that a principal purpose of WCI in entering into the transaction was to evade millions of dollars of pension liabilities, thereby foisting them onto the PBGC.

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[1] PBGC is a wholly-owned United States government corporation whose Board of Directors is composed of the Secretaries of Labor, Commerce and Treasury. 29 U.S.C. § 1302(d). PBGC has independent litigating authority, and appears in this Court through its own counsel. 29 U.S.C. § 1302(b)(1).

[2] A "controlled group" consists of certain affiliates of the plan sponsor. I.R.C. § 414(b), (c); 29 U.S.C. § 1301(a)(14); Treas. Reg. § 1.414(b)-1, (c)-2; 29 C.F.R. pt. 2612.

[3] As the Court has noted, PBGC has historically been able to recover only a small fraction of its claims against plan sponsors and their controlled group members, because those entities are usually in financial distress. *See PBGC v. LTV Corp.*, 496 U.S. 633, 638 (1990).

On September 26, 1991, PBGC filed a complaint against WCI in the United States District Court for the Western District of Pennsylvania, seeking a declaration that WCI would be liable for the Plans' unfunded benefit liabilities upon their termination. On March 3, 1992, after the largest of the Plans had to be terminated because it ran out of assets to pay benefits currently due, *see* 29 U.S.C. § 1342(a), PBGC filed an amended complaint. In Count I of its amended complaint, PBGC alleged that WCI is liable under 29 U.S.C. § 1362, because its transfer of pension liabilities to BKC was a sham, undertaken to evade those liabilities, and therefore void under the substance-over-form doctrine. In Count IV of the amended complaint, PBGC alleged that WCI is liable under 29 U.S.C. § 1369, because a principal purpose of WCI in entering into the transaction was to evade the huge pension liabilities transferred to BKC. The PBGC further alleged that WCI's evasive transaction, when viewed as a whole, did not become effective for purposes of section 1369 until WCI ceased keeping the pension plans alive artificially pursuant to its pre-arranged scheme that included WCI making large contributions to the Plans for five years after their transfer to BKC.

On April 30, 1992, WCI filed a motion to dismiss the amended complaint pursuant to Fed. R. Civ. P. 12(b)(6). The district court granted WCI's motion on September 11, 1992, and PBGC appealed. On June 30, 1993, the United States Court of Appeals for the Third Circuit reversed in part, unanimously holding that Counts I and IV of PBGC's amended complaint state legally sufficient claims for relief.[4] WCI filed a petition for rehearing with suggestion for rehearing in banc. On July 30, 1993, the

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[4] PBGC's amended complaint contained a total of five counts, all of which were dismissed by the district court. PBGC did not appeal the dismissal of Count II. The court of appeals affirmed the dismissal of Counts III and V.

court of appeals denied WCI's petition. WCI's petition to this Court for a writ of certiorari followed.[5]

For a more in-depth recitation of the relevant facts, PBGC adopts and incorporates the FACTUAL BACKGROUND portion of the Third Circuit's opinion in this case. App. 4-7.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE FACT-SPECIFIC CONCLUSIONS OF THE COURT BELOW DO NOT INVOLVE BROADLY-APPLICABLE QUESTIONS OF FEDERAL LAW.

There are two issues at this stage of the case: 1) when WCI's transaction to evade pension liabilities became effective for purposes of 29 U.S.C. § 1369; and 2) whether PBGC's amended complaint states a viable claim for relief under the substance-over-form doctrine. Both issues, and the Third Circuit's resolution of them, relate specifically to the facts alleged in PBGC's amended complaint. For this reason, this case does not involve broadly-applicable questions of federal law that warrant review by this Court.

PBGC alleges that, pursuant to 29 U.S.C. § 1369(a), WCI is liable for the unfunded benefit liabilities in the Plans it transferred to BKC, upon their termination. Section 1369(a) provides in part:

> If a principal purpose of any person in entering into any transaction is to evade liability to which such person would be subject under this subtitle [29 U.S.C. §§ 1361-1371] and the transaction becomes effective within five years before the termina-

[5] On the same day PBGC filed its complaint in this case, the pension plans and their fiduciaries filed a separate complaint against WCI, setting forth some related allegations. The district court dismissed that complaint, and the court of appeals reversed in part. App. 22-38. In its petition to this Court, WCI indicates that it is seeking review of that decision as well.

> tion date of the termination on which such liability would be based, then such person and the members of such person's controlled group (determined as of the termination date) shall be subject to liability under this subtitle in connection with such termination as if such person were a contributing sponsor of the terminated plan as of the termination date.

WCI moved to dismiss this claim on the ground that none of the transferred pension plans terminated within five years after WCI closed its deal with BKC. The court of appeals correctly held, however, that the five-year period in section 1369 begins to run not at the time a deal closes, but at the time the evasive transaction "becomes effective."

As the court of appeals implicitly recognized, the determination of when a transaction "becomes effective" for purposes of section 1369 necessarily depends on the particular facts and circumstances in each case. Here, PBGC's complaint alleges that WCI structured its transaction specifically to prevent the Plans' termination within five years of their transfer to BKC, through large annual contributions to the Plans for five years and a combination of a letter of credit and a unique set of indemnities and security interests in all BKC's assets to protect WCI from pension liability. Based on those allegations, the court of appeals held that "the PBGC has stated a legally sufficient claim under 29 U.S.C. § 1369 (1988)." App. 3.

The court of appeals appropriately decided this issue in the context of the entire statutory provision—which embodies Congress's concern with transactions involving the evasive transfer of unfunded pension liabilities—and held that the transaction did not become effective until 1990, when WCI ceased making large contributions to the Plans it had purportedly transferred to BKC in 1985. The court's approach is plainly consistent with the language, history, and purpose of section 1369. It recognizes, moreover, that a contrary reading of the statute

would invite and encourage creative schemes such as this one, designed to evade pension liabilities in contravention of Congress's intent. Even more important for purposes of WCI's petition to this Court, it was based on the unique and specific facts alleged in PBGC's complaint; its applicability to other cases is thereby necessarily limited.

Similarly, the court of appeals' decision regarding the effective date of section 1369 itself was based on the specific facts alleged in PBGC's complaint. Section 1369 is applicable "with respect to transactions becoming effective on or after January 1, 1986." Pub. L. No. 99-272, § 11013(b), 100 Stat. 82, 261 (1986). The court of appeals held that, under the facts alleged, the evasive transaction in this case did not become effective until 1990, when WCI ceased making substantial contributions to the Plans. Petitioner has articulated no reason why this fact-based conclusion warrants review by the Court.[6]

The court of appeals' conclusion that PBGC's sham transaction claims under Count I survived WCI's motion to dismiss was also based entirely on the allegations in

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[6] WCI argues that, by construing section 1369's effective date in this fashion, the court of appeals applied it retroactively. But this argument is circular. If the court of appeals was correct in holding that the transaction did not become effective until WCI made its last pension contribution in 1990, it did not apply the statute retroactively. Moreover, WCI cannot have it both ways. It successfully argued below that PBGC could not assert a claim for predecessor liability under the *Harvester* implied termination theory, because section 1369 occupied the field for transactions to which it was applicable. *See* n.8, *infra*. Had the court of appeals found section 1369 inapplicable, it undoubtedly would have reversed the district court's dismissal of Count III of PBGC's complaint, which alleged a claim under the *Harvester* theory.

In any event, WCI did not directly raise this retroactivity issue in the lower courts, nor did either of the lower courts discuss it. It should not be permitted to raise the issue for the first time in this Court. *See, e.g., Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976).

PBGC's complaint. App. 20-21. This issue involves whether WCI's deal with BKC was motivated solely by a desire to rid itself of pension liabilities, or whether eliminating operating losses also was a factor. WCI contends that the court below misread the complaint in concluding that, consistent with the requirements of prior decisions of this Court, it contained an allegation that WCI's sole motivation was to do away with pension liabilities.[7] But even assuming *arguendo* that WCI is correct, it is not the role of this Court to decide whether PBGC's complaint as a whole fairly contains the requisite allegations. If it does not, or if PBGC is unable to sustain those allegations, the district court will have ample opportunity at trial to rectify any arguable error. Accordingly, this issue presents no basis for the Court to grant the writ.

II. THE THIRD CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER COURT.

PBGC has brought very few actions involving transactions to evade pension liabilities. In fact, the only other cases addressing either of the issues presented here are *In re Consolidated Litigation Concerning International Harvester's Disposition of Wisconsin Steel*, 681 F. Supp. 512 (N.D. Ill. 1988),[8] and *In re Doskocil Cos.*, 130

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[7] The Third Circuit thought the pleadings were unclear on this point, but noted that "WCI's contention that one objective of the sale was to dispose of an unprofitable operation is undermined by the allegation that it summarily rejected any offer to buy the businesses that required it to retain the pension plan liabilities." App. 20-21. Because this issue was raised in the context of WCI's motion to dismiss, the court of appeals appropriately construed the complaint liberally in favor of PBGC, noting that it could affirm its dismissal "only if it appears certain the plaintiff can prove no set of facts that would entitle it to relief." App. 9-10. *See, e.g., Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

[8] *Harvester* held that, even prior to the enactment of section 1369, a predecessor sponsor of a pension plan was liable under an evasive transaction theory if: 1) a principal purpose of the predecessor in

B.R. 858 (Bankr. D. Kan. 1991).[9] The Third Circuit in this case was the first and only appellate court to decide a case involving these issues; accordingly, its decision does not conflict with a decision of any other court of appeals.

Nor does the court of appeals' decision conflict, either directly or in principle, with *Mertens v. Hewitt Assocs.*, —— U.S. ——, 113 S. Ct. 2063 (1993), or any other decision of this Court. To be sure, *Mertens* teaches that ERISA must be enforced according to "the words of its text." *Id.* at 2071. WCI argues that the phrase "[when a] transaction becomes effective" in section 1369 can mean nothing other than "when a sale closes." But those are not the words of the text. The court of appeals applied section 1369 according to its terms in concluding

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the transaction was to evade pension liabilities; and 2) the transferee of the liabilities lacked a reasonable chance of meeting those obligations. 681 F. Supp. at 526. WCI attacks the Third Circuit's decision in this case by focusing on its statement that "[b]y enacting section 1369, Congress codified the *Harvester* predecessor liability rule." App. 13. While WCI correctly points out that the 1986 Congress could not have codified the 1988 *Harvester* decision, the rationale of the court was nevertheless sound and is fully supported by the legislative history of section 1369. *See, e.g.*, H.R. Rep. No. 300, 99th Cong., 1st Sess. 283 (1985) ("Under current law, if a company transfers unfunded pension benefits to an entity that does not have a reasonable chance of paying for those benefits, the transferor is liable under [29 U.S.C. § 1362] in the event of plan termination.").

Count III of PBGC's complaint in this case alleged that WCI was liable under 29 U.S.C. § 1362 on the *Harvester* theory, but the court of appeals upheld the district court's dismissal of that count on the ground that section 1369 occupies the field for transactions to which it applies. App. 17. Had the court of appeals accepted WCI's argument that section 1369 was inapplicable in this case because its transaction became effective prior to the enactment of section 1369, the court of appeals undoubtedly would have reached a different result on Count III.

[9] WCI mistakenly refers to the bankruptcy court's decision in *Doskocil* as the decision of a district court. Petition at 21 n.17.

that, on the facts of this case, WCI's evasive transfer of unfunded pension liabilities did not "become effective" until WCI had ceased making large contributions to the Plans.

III. NOTHING IN THIS CASE WARRANTS A DEPARTURE FROM THE COURT'S NORMAL PRACTICE OF DENYING INTERLOCUTORY REVIEW.

Review of the decision below at this stage of the case is both premature and unnecessary. This case does not involve an important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, a conflict among the circuits or with a decision of the Court, or any other extraordinary factor that would justify a departure from the Court's "normal practice of denying interlocutory review." *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting). The court of appeals remanded the case for further proceedings consistent with its opinion; in due course, the district court can be expected to schedule the case for trial. That trial may well moot the issues raised here. But even if it does not, WCI will have ample opportunity to raise these issues again in a petition for certiorari from the final judgment. *See, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 672 n.19 (1979); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973). And at that point, unlike now, the Court will have a fully-developed factual record upon which to evaluate any legal issues still remaining that warrant the Court's review. Review at this stage is, therefore, both unnecessary and inappropriate.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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